Compare *Stearn* v. *Prentice* (1918), 68 L. J. (K. B.) 422 (defendant not liable for the depredations of rats harbored in his boneyard).

It is generally held that one is not liable for the mere trespass of his dog, not known to be dangerous to persons; ordinarily, of course, a dog is not dangerous to crops. *Brown* v. *Giles* (1823), 1 Car. & P., 28 R. R. 769; *Woolf* v. *Chalker* (1862), 31 Conn. 121, 128; *Read* v. *Edwards* (1864), 17 Com. B. N. S. 245; *Sander* v. *Teape* (1884), Q. B., 51 L. T. N. S. 263; *Buchanan* v. *Sweet* (1908), 108 N. Y. S. 38; *Van Etten* v. *Noyes* (1908), 112 N. Y. S. 888; *Doyle* v. *Vance* (1880), 6 Vict. L. R. 87, *contra.*

Similar rulings have been made as to *deer, Keilway*, 30, Y. B. 10 Hen VII, 6, pl. 12 (1495); *Brady* v. *Warren* [1900], 2 I. R. 632, 661; *State* v. *Ward*, 170 Ia. 185; and as to *bees, Brown* v. *Eckes*, 160 N. Y. S. 489; *Earl* v. *Van Alstine* (1858), 8 Barb. 630; *O'Gorman* v. *O'Gorman* [1903], 2 I. R. 573.

Of course, fowls may become a nuisance because of the dust, odor, or noise they cause. *Ireland* v. *Smith* (1895), 3 Sc. L. T. Rep. —, 33 Scot. L. R. 156; *Desmond* v. *Smith*, 9 GREEN BAG, 550, 41 Sol. J. 167.

It is submitted the common law, as set forth in the principal case, should be considered the correct rule, where damage is done by any such animals in the exercise of their well-known natural propensities, unless due to the intervening act of God or the independent act of some third party, or similar excuse. See "Responsibility at Common Law for Keeping Animals," THOMAS BEVEN, 22 HARV. L. REV. 465; ROBSON, TRESPASS BY ANIMALS.

H. L. W.

FUTURE INTERESTS IN RECENT STATUTES AND CASES—REMAINDERS, DEVISES AND USES.—To the layman, or the beginner in the study of property law, the intricate sinuosities of *Shelley's Case* and *Archer's Case*, of contingent remainders and their destructibility, of indestructible executory devises and uses, springing and shifting, seem inexplicable, incomprehensible, and useless. But a longer estate than for the life of him who must perform the feudal services on which his tenure rested is a concept that would have seemed equally strange and impossible either to lay or legal mind when feudalism was in fullest flower. Pure feudalism had no room for future estates, but only for present holdings, based on present services, to be performed by the present tenant while he lived. An estate to A was not an estate for A to pass to another, either *inter vivos* or at death, but to keep, and only while he performed the personal services that went with it. When estates to A and his heirs came to be recognized the concept was still of a life estate to A, and "to his heirs" merely indicated that at the end of A's life the estate in natural course would go to him who should be his heir, and so on in indefinite succession. 15 COL. L. REV. 680.

It was a sign that feudalism was already beginning to crumble when it began to be suggested that an estate might be created carrying a present interest in A and a future interest in his heirs, and the development of the concept was a long process. It is more than possible that the rule in Shel-

ley's Case had never been if the first appearance of the principle now known by that name (in 1324) had not preceded by more than a century the recognition of the possibility of a destructible contingent remainder (in 1430). See Lord Macnaghten in *Van Grutten* v. *Foxwell* [1897], App. Cas. 658. For if the remainder to the heirs of A in *Shelley's Case* had been treated as a contingent remainder after A's death, and therefore destructible by A in his life, free alienability by A would have been secured without executing in him and adding to his life estate, as under the Rule in Shelley's Case, the remainder expressly limited to his heirs.

But feudalism and its fruits have long been gone. It might be supposed that the reason for the law having ceased, the law itself would have disappeared. Quite otherwise. Indeed, Lord Macnaghten's remark in the case referred to, that the subject "rarely comes up for discussion nowadays," is not justified by an examination of the recent reports. They are full of cases involving contingent remainders, *Shelley's Case, Archer's Case, etc.*, not merely in such a state as Illinois, where they are most exuberant and intricate; *Moore* v. *Reddel*, 259 Ill. 36; *Aetna Insurance Co.* v. *Hoppin*, 214 Fed. 928 (a 1914 Illinois case), but in many other states as well. The cases show we must say rather "the reason of the law having changed, the law has changed also," but curiously enough, almost always by statute, not by court decision. And the statutes hark back to the old phrases and terminology and the old rules, so that one can understand the language of the new rule only by a thorough study of the old cases. In England at least three attempts have been made to do away with the frailty of contingent remainders, and not yet is it completely gone. A comprehensive statute was enacted in 7 & 8 VICT., c. 76, s. 8, but it seems to have so affrighted the conveyancers, see 30 HARV. L. REV. 227 ff., that it was repealed and a new statute enacted the next year, 8 & 9 VICT., c. 106. This cured so little that thirty years later the Contingent Remainders Act of 1877, 40 & 41 VICT., c. 33, was enacted, which partly restored 7 & 8 VICT., but left some cases unprotected.

We may compare a Massachusetts and an Illinois statute. The latter is not free from references to "supposed rules," and to "double possibilities," a much talked of and utterly repudiated term, but it is comparatively simple, and attempts in sweeping terms to resolve contingent remainders to present day needs, to make such a rule as we may suppose would have been adopted if defunct feudal institutions had never been. MASS. GEN. ACTS, 1916, c. 108, provides that "a contingent remainder shall take effect, notwithstanding any determination of the particular estate (Cf. 8 & 9 VICT., above), in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use (Cf. 7 & 8 VICT., repealed by 8 & 9 VICT.), and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." How impossible an understanding of the language of this statute, without a knowledge of the ancient estates and their history! To one who understands, the last clause shows an intent to bring the Massachusetts law

to the position contended for by Professor Gray in his attack on *Whitby* v. *Mitchell*, 42 Ch. 494, 44 Ch. 85, GRAY RULE AGAINST PERPETUITIES, Appendix K, and the lively dispute there referred to between the author and Mr. Charles Sweet, 30 HARV. L. REV. 226. The Massachusetts statute in effect abolishes contingent remainders, and resolves them, if they are limitations in a will, to executory devises; if in a deed, to springing or shifting uses. They are thus transformed, supposedly in accordance with the intent of the devisor or grantor, from destructible contingent remainders into indestructible devises or uses. Freedom of alienation is preserved by subjecting them to the same rule against perpetuities that was invented to check executory devises and springing and shifting uses, i. e., future estates cannot be limited to take effect beyond a life or lives in being and twenty-one years. This common law period is the rule in Massachusetts. *Minot* v. *Paine*, 230 Mass. 514 (1918); *Gray* v. *Whittemore*, 192 Mass. 367 (1916). If this period is too long to tie up land the remedy is for the legislature.

The Illinois statute referred to is REV. ST. 1874, c. 30, s. 6: "In cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate would, on the death of the first grantee, devisee or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance." Here again to one not steeped in the ancient law the language is meaningless. Its labored language in terms of the law of the past required the impossible. In Illinois primogeniture had been abrogated. Property could not "pass according to the course of the common law" to the eldest son, but must be distributed among all the heirs of the first taker. In 1 ILL. L. REV. 322 ff., Mr. Kales has well pointed out that the court has made over the statute by high-handed construction. *Moore* v. *Riddel*, 259 Ill. 36. As made over, it ties up the land for one generation at least as the feudal lords in vain tried to do by the Statute de Donis, for it gives a life estate to the first taker, with remainder in fee to persons not born perhaps till near the death of the life tenant. That makes it possible to tie up the Marshall Field estate for possibly seventy-five years from the death of the owner, a serious clog upon alienation in a country changing so fast as ours. There seems urgent need of a shortened period for the rule against perpetuities, but so firmly is the old law upon us that no courts and few statutes have cut down the period. New York, followed by Michigan and some other states, has fixed the limit at two lives in being. This has some things to commend it, though Mr. Gray finds in the increase of litigation in New York serious objections. GRAY, RULE AGAINST PERPETUITIES, Sec. 749 ff.

The clumsy Illinois statute doubtless was intended merely to abolish estates tail. This could have been done by giving to the life tenant an estate

in fee simple absolute, or with contingent remainder over to the heirs. Twice at least a fairly simple draft of a bill intended to do that has been submitted to the Illinois legislature, but the old law stands.

In the centuries old contest over future estates there have been two leading and conflicting ideas, intent and freedom of alienation, action and reaction on which have molded the law of future estates. To give effect to the intent of the testator Lord Mansfield pronounced his famous, or infamous, opinion in *Perrin* v. *Blake,* 1 W. Bl. 672, and precipitated the fierce and humorous contest so entertainingly described in 3 CAMPBELL'S LIVES OF THE JUSTICES, 305. In *Jesson* v. *Wright,* 2 Bligh 1, Lord Eldon emphasized freedom of alienation, and brought the rule back to a rule of law to be rigidly applied, even though defeating intent. He assumed to regard the general as distinguished from the particular intent, but would have done better to agree with Lord Redesdale in sticking to the law defeating intent. As Cockburn, C. J., put it in *Jordan* v. *Adams,* 9 C. B. (N. S.) 483, "the fatal words once used" the law "inexorably and despotically fixes on the donor" all the consequences of bringing his provisions within the rule, "although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular." As to contingent remainders, the Massachusetts act very sensibly allows free play to intent for a period by preserving them from the destruction that might have been their fate at common law. Beyond that period the restrictions cannot operate; indeed, the limitations must not try to tie up beyond, or they are void in their inception. Such in a general way is the effect of the various provisions of the Michigan statutes, C. L. 1915, c. 220, and of such a code as that of Georgia, CODE of 1911, Sixth Title, c. 3.

The importance of the ancient rules and the history of their development have been touched upon. The digests show how constantly cases are before the courts, and seem to justify the statutes that have tried to modify the rules to suit present day needs, for Illinois, which has refused to make many changes, shows an unrest and dissatisfaction to such an extent as to give color to the claim that she has as many cases as all the other states together. The three latest bound volumes of the Illinois reports illustrate the fact that under the old rules one can hardly be sure what kind of a future estate he has in hand until the supreme court has pronounced, not once merely, but for the last time. Not only do the lawyers differ, which is to be expected if the opposing sides are to have counsel, and the judges disagree, which is not unusual, but the same court on consideration at different times of the same instrument is not unlikely to reach different conclusions. See, for example, *Cutler* v. *Garber,* 289 Ill. 200 (Oct., 1919), finding the future interests to be executory, which in 261 Ill. 378 had been held to be contingent remainders. Under the Massachusetts statute this would have made no difference. In 292 Ill. attention may be called to *Cole* v. *Cole,* in which, at page 170, the old doctrine of destruction of contingent remainders by merger is held to be still flourishing, and to *Bender* v. *Bender,* at page 363, where the contingent remainderman, there also a reversioner, is recog-

nized as having an interest which he may protect by suit. This latter is touched upon in *Du Bois* v. *Judy,* 291 Ill. 340, in which the court attacks as though they were new in the state the property problems of the case, stating in full the rule in *Shelley's Case,* defining remainders, and laying down the law as to the destructibility of contingent remainders which has hardly been doubted since *Chudleigh's Case,* 1 Co. 120a. In *Gray* v. *Shinn,* 293 Ill. 573 (June, 1920), the court feels called upon again to define contingent and vested remainders, and announces the well-known fact that a contingent remainder falls with the death of the life tenant before the vesting of the remainder, page 579, as it would not if Illinois had the modern statute, and Cf. *Lewin* v. *Bell,* 285 Ill. 227. At 293 Ill. 581, it is pointed out that there is no rule to prevent voluntary destruction of contingent remainders by a conveyance for that express purpose by the life tenant to a third person to bring about a merger. But should there not be such a rule, coupled with a rule against remoteness? It is for the legislature to say. Litigants seem to want it, for the interesting thing is not so much that the courts should again and again restate these elementary matters as though they were new and not centuries old, but that there should seem to be such repeated and persistent refusal to accept the rules. The court contents itself, as probably it must, with a restatement of the oft stated rules. Change in a rule of property so long acted upon should be made by the legislature, and then not retroactively, but Illinois refuses to change, though curiously enough agitation there has been more insistent than elsewhere. See 1 ILL. L. REV. 311. In addition to the above cases, see *Sellers* v. *Rike,* 292 Ill. 468, fully stating the Rule in Shelley's Case and rigidly applying it, though it overrides intent. *Noth* v. *Noth,* 292 Ill. 536, dealing with an executory devise and an expectancy; *McBride* v. *Clemons* (Ill., June, 1920), 128 N. E. 283, holding a limitation to be an executory devise and indestructible, and not a destructible contingent remainder; and *Biwer* v. *Martin* (Ill., October, 1920), 128 N. E. 518, applying the common law rule as to destruction of contingent remainders by merger, and the modified rule as to conveyance of such remainders by way of an estoppel or release. Cf. *Kenwood Trust & Savings Bank* v. *Palmer,* 285 Ill. 552, holding a contingent remainder cannot be the subject of sale, as it could be in Michigan and other states where it is alienable, descendible and devisable. *Graff* v. *Rankin,* 250 Fed. 150, may be cited as a recent case in which the Federal court applied the Illinois law to contingent remainders in a devise to one "Illinois Riggs and her lawful issue," with certain added limitations. Truly, this was an Illinois case, and the peculiar thing about many of the above cases is that if the Illinois law had been changed the questions in dispute would not have arisen.

In other states there still are, and no doubt always must be, cases on future interests, even in those that have done most to square the law with present day conditions and desires. In *Trull* v. *Tarbell* (May, 1920), 127 N. E. 541, the Massachusetts court construed interests as vested in preference to contingent. The Michigan statute as to perpetuities had to be construed in *Cary* v. *Toles,* 210 Mich. 30 (April, 1920), and *Woolfit* v. *Preston,* 203

Mich. 502 (Dec., 1918). The Michigan court is justified in its position in *In re Blodgett's Estate,* 197 Mich. 455, that full force may be given to intent, since the statute has relieved contingent remainders of their common law infirmities, and by proper restrictions has protected the public against the perpetuities that might result. The law favors vested estates, but will recognize others where the intent to create them is clear. It does not favor joint tenancies, but nevertheless permits them. The language to create contingent remainders must, however, be plain and unambiguous. *In re Shumway's Estate,* 194 Mich. 245. That such language may be held by a trial judge and by the Supreme Court to show clearly two perfectly opposite things appears in *Colby* v. *Wortley,* 205 Mich. 609. Expectant estates having been made descendible, devisable, and alienable, it matters less than formerly whether estates are vested or contingent, but there are still vital distinctions.

This note is already too long to permit further detailed notice of cases. The present importance in all jurisdictions of problems of future interests is suggested by the following list of very recent cases which the curious may examine. Alabama, *Deremus* v. *Deremus,* 85 So. 397 (Feb., 1920); Georgia, *Cock* v. *Lipsey,* 96 S. E. 628 (Aug., 1918); Kansas, *Moherman* v. *Anthony,* 188 Pac. 434 (March, 1920); Maine, *Real Estate, etc., Co.* v. *Dearborn,* 109 Atl. 816 (April, 1920); *Carver* v. *Wright,* 109 Atl. 896 (May, 1920); Maryland, *Hempel* v. *Hall,* 110 Atl. 210 (Feb., 1920); Mississippi, *City Savings Bank, etc.,* v. *Cortwright,* 84 So. 136 (April, 1920); Missouri, *Bramhall* v. *Bramhall,* 216 S. W. 766 (Dec., 1919); *Hartnett* v. *Langan,* 222 S. W. 403 (June, 1920); Nebraska, *Yates* v. *Yates,* 178 N. W. 262 (June, 1920); New York, *In re Tift,* 180 N. Y. S. 884 (Feb., 1920); *Montague* v. *Curtis,* 181 N. Y. S. 709 (March, 1920); *U. S. Trust Co.* v. *Perry,* 183 N. Y. S. 426 (July, 1920); Ohio, *In re Youtsey,* 260 Fed. 423 (March, 1916); Oregon, *Lee* v. *Albro,* 178 Pac. 784 (Feb., 1919); Pennsylvania, *Berkley* v. *Berkley,* 109 Atl. 686 (Feb., 1920); *In re McConnell's Estate,* 109 Atl. 846 (Feb., 1920); *In re Groninger's Estate,* 110 Atl. 465 (June, 1920); Rhode Island, *Aldrich* v. *Aldrich,* 110 Atl. 626 (July, 1920); South Carolina, *Home Bank* v. *Fox,* 102 S. E. 643 (March, 1920); Texas, *Crist* v. *Morgan,* 219 S. W. 276 (March, 1920); Virginia, *Turner* v. *Monteiro,* 103 S. E. 572 (June, 1920); *Prince* v. *Barham,* 103 S. E. 626 (June, 1920).

This brief study justifies the claim that the common law rules as to future interests are quite inconsistent with the legislative policy of England and the United States. Where the old rules have not been changed litigants are constantly objecting. In the states that have changed most appears comparative quiet. The lesson, if lesson there be, is that statutes should give freedom to intent in creating futures estates, and preserving them when created, but at the same time preserve freedom of alienation by cutting down, perhaps more than has yet been done, the period of perpetuities. With such statutes the Rule in Shelley's Case, *Chudleigh's Case, Purefoy* v. *Rogers,* and the rest, could be filed away as curios, and the law of real property and modern needs and desires could dwell together in harmony. E. C. G.